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In the Supreme Court of the United States

OCTOBER TERM, 1998

HARBERT/LUMMUS AGRIFUELS PROJECTS, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly reversed the trial court's judgment in favor of petitioners, based upon a breach of an oral contract by the United States, because no lawful contract existed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 62-74) is reported at 142 F.3d 1429. The opinion of the United States Court of Federal Claims (Pet. App. 1-61) is reported at 36 Fed. Cl. 494.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1998. A petition for rehearing was denied on July 27, 1998 (Pet. App. 75). The petition for a writ of certiorari was filed on October 26, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, pursuant to the Biomass Energy and Alcohol Fuels Act of 1980, 42 U.S.C. 8801 *et seq.*, the United States Department of Energy (DOE) contracted with Agrifuels Refining Corp. (Agrifuels) and various lending banks for DOE to provide a 90% guarantee of the construction financing of an ethanol plant that would be owned by Agrifuels. Agrifuels separately contracted with petitioners for the latter to construct the plant. Pet. App. 3-5.

The construction payment schedule, which was included in both DOE's loan servicing agreement with Agrifuels and in Agrifuels' separate construction contract with petitioners, provided for disbursement of progress payments over 21 months. Pet. App. 6-7. When construction progressed more quickly than the 21-month disbursement schedule, petitioners requested a modification of the schedule to reflect their actual performance. Agrifuels forwarded to DOE different forms of the request, which was ultimately denied. *Id.* at 23-28, 35.

In January 1987, prior to completion of plant construction, Agrifuels' parent corporations declared Chapter 11 bankruptcy, which constituted a default under Agrifuels' guarantee agreement with DOE and the financing banks. Pet. App. 28-29. Instead of immediately exercising their default rights, DOE and the banks executed monthly waivers. *Id.* at 29. However, concerns arose about the viability of the project and a need to restructure financing. *Ibid.* At a meeting of the various parties held on February 24, 1987, the Vice President of Harbert International, Inc., stated that he wanted the requested disbursement modification approved. *Id.* at 29-30.

Daniel Beckman, DOE's Deputy Director of the Office of Alcohol Fuels, who did not have contracting authority, responded that DOE was committed to funding the project to completion, and if the contractor completed the project, all of the payments would work out. The trial court found that the DOE contracting officer, Thomas Keefe, was present when that statement was made and did not question it. Pet. App. 30-31. Although finding Keefe present, the trial court did not find that Keefe actually heard the Deputy Director's statement at the meeting. Keefe was deceased by the time of trial, and had not previously provided any testimony. *Id.* at 28.

The parties continued to meet to discuss possible new arrangements for financing in light of Agrifuels' default. Pet. App. 32-40. On April 9, 1987, during one of these meetings, DOE informed the parties that the Secretary of Energy would not proceed with the guarantees of any more disbursements because the project was not viable. *Id.* at 39-40. Subsequently, DOE formally declared Agrifuels in default and assumed control of the plant pursuant to its rights under the guarantee agreement. *Id.* at 42-43.

DOE eventually paid approximately $70 million in guarantees upon the previous disbursements. DOE ultimately sold the plant for scrap for approximately $3 million. Pet. App. 43.

2. Nearly six years later, in 1993, petitioners filed suit against the United States in the United States Court of Federal Claims, essentially asserting two claims.

First, petitioners claimed that in 1985, at the time of the closing of the various written contracts related to the project, negotiators for petitioners and DOE entered into a separate oral contract. Petitioners claimed

that DOE promised that if the joint venture performed its construction contract with Agrifuels on an accelerated schedule, DOE would approve an amendment to the payment schedule of the construction contract, allowing Agrifuels to disburse DOE-guaranteed funds to petitioners on that accelerated basis. Because DOE never approved such a modification of the payment schedule, at the time DOE withdrew its guarantee petitioners had been paid far less by Agrifuels for their performance of the construction contract than they would have been paid had DOE allowed accelerated payment. Pet. App. 44.

Second, petitioners alleged that, in February 1987, after Agrifuels defaulted under its guarantee agreement with DOE, Keefe orally promised petitioners that DOE would continue guaranteeing disbursement of funds for the project until completion, inducing petitioners to remain on the job longer than they would have otherwise. Pet. App. 44.

3. After a trial, the Court of Federal Claims rejected petitioners' claim that an oral contract was formed requiring DOE to approve an accelerated payment schedule. Pet. App. 44-49. However, the court found that at the February 24, 1987 meeting, Beckman made an oral offer to petitioners that DOE would continue to guarantee future funding of the project through completion, notwithstanding Agrifuels' default, if petitioners would not follow through on a threat to abandon the project. *Id.* at 30-31, 45-55.

The trial court found that this oral statement by Beckman constituted a formal offer to petitioners to enter into a unilateral contract with DOE, and that such a contract was formed when petitioners performed by remaining on the job. Pet. App. 49-55. The trial court did not find that Beckman possessed authority to bind

the government to this oral promise. *Id.* at 14 n.27, 55-57. Instead, it found that Keefe, who was present but remained silent when Beckman made the statement, possessed the authority to enter into such an oral contract with petitioners, and his silence amounted to a ratification of Beckman's statement.[1] *Id.* at 31, 49, 55-57. The trial court then held that in April 1987, when the Secretary of Energy decided that no new additional loan disbursements would be guaranteed by DOE, he in effect repudiated the oral contract, obligating the government to pay up to the amount of its guarantee for the additional work that petitioners had performed after February 24 in reliance upon the promise. *Id.* at 52, 55, 60.

In a subsequent decision dated December 19, 1996, the trial court elaborated upon the nature of the contract that it had found. Pet. App. 156. After ruling that the government was liable to petitioners for $2,870,768, the trial court emphasized that "[w]hat [it] has found in the present facts is an express oral contract entered into by an executive agency for the procurement of plaintiff's construction services." *Id.* at 160. The trial court therefore ruled that the pre-judgment interest provisions of the Contract Disputes Act (CDA), 41 U.S.C. 611, applied. Pet. App. 160. The court issued judgment for petitioners in the amount of $2,870,768, plus interest from February 4, 1993.

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[1] Petitioners imply that the trial court found that Keefe affirmatively stated his consent to the agreement by quoting the trial court's statement that Keefe had "acquiesced." Pet. 5. However, the trial court's findings do not include any affirmative act or statement by Keefe. Instead, the court based its conclusion that Keefe "acquiesced" on the mere fact that he was present and did not question Beckman's statement. Pet. App. 31, 49, 56 n.67.

4. The government appealed the trial court's judgment for petitioners that there was a unilateral contract obliging DOE to continue to guarantee disbursements until petitioners completed the project. Petitioners cross-appealed the trial court's rejection of their allegation that an earlier contract was also formed committing the government to approve any request for modification of the payment disbursement schedule.

5. The court of appeals reversed the trial court's judgment in favor of petitioners. Pet. App. 62. The court of appeals ruled that the trial court erred in holding that Keefe was authorized to bind DOE to the oral contract because Keefe's delegation of authority required that all actions taken by him be accompanied by a prior written approval.[2] *Id.* at 67-70. No evidence of such written approval was presented to the trial court. *Id.* at 68-69.

The court of appeals further held that even if Keefe had been delegated authority to bind DOE to an oral contract, he did not ratify such an oral contract in the

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[2] On November 15, 1986, Keefe was delegated "the authority, with respect to actions valued at $50 million or less, to approve, execute, enter into, modify, administer, closeout, terminate and take any other necessary and appropriate action (collectively, 'Actions') with respect to Financial Incentive awards." Pet. App. 68, 111-112. Citing DOE Order No. 5700.5 (Jan. 12, 1981), the delegation defines "Financial Incentives" as the authorized financial incentive programs of DOE, "including direct loans, loan guarantees, purchase agreements, price supports, guaranteed market agreements and any others which may evolve." The delegation proceeds to state, "[h]owever, a separate prior written approval of any such action must be given by or concurred in by Keefe to accompany the action." The delegation also states that its exercise "shall be governed by the rules and regulations of [DOE] and policies and procedures prescribed by the Secretary or his delegate(s)." Pet. App. 111-113.

circumstances presented here. There was no finding that Keefe actually heard Beckman make the offer that supposedly led to the unilateral oral contract. In the absence of a finding that the authorized official had knowledge of the unauthorized act, he could not be found to have ratified it. The mere finding by the trial court that Keefe was present when Beckman made the oral offer is not a finding that Keefe heard the offer. Pet. App. 70-71. The court of appeals also held that ratification requires a demonstrated acceptance of the contract, and mere silence is not a demonstrated acceptance. *Id.* at 71-72. Finally, the court of appeals noted that the same delegation of authority requiring Keefe to memorialize his actions in writing required that any ratification by him be memorialized in writing, and no such memorialization existed. *Id.* at 72.

In an aspect of its decision not challenged before this Court, the court of appeals rejected petitioners' cross appeal of the trial court's holding that there was no earlier contract binding DOE to approve a requested modification of the disbursement schedule. Pet. App. 72-73.

ARGUMENT

The decision of the court of appeals is correct, is consistent with this Court's decisions, and does not conflict with any decision of any other court of appeals. Accordingly, further review is not warranted.

1. The court of appeals' decision turns initially upon whether the contracting officer, Keefe, possessed the authority to enter into the express, oral, unilateral contract found by the trial court. Applying the long established principle that the government is not bound by the acts of its agents beyond the scope of their authority (Pet. App. 67), the court of appeals analyzed

the delegation of authority issued to Keefe and correctly concluded that it did not permit him to enter into a contract that was not accompanied by a prior written approval.

The terms of that delegation permit no other conclusion. After specifying the acts Keefe may take on behalf of DOE, his delegation expressly requires that "a separate prior written approval of any such action must be given by or concurred in by Mr. Keefe to accompany the action." Pet. App. 68, 111-112. The court of appeals correctly noted that Keefe was not authorized to act on behalf of DOE in disregard of this requirement.

"[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383 (1947); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921)(those purporting to contract with a government agent "must be held to have had notice of the limitations upon his authority").[3]

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[3] Petitioners suggest that they did not bear this obligation by citing a DOE regulation requiring contracting officers, upon their discovery that work is being performed pursuant to an unauthorized commitment, to inform contractors that they are performing at their own risk. Pet. 13 n.3. (Petitioners incorrectly cite 48 C.F.R. 901.602-3 (1995) as the regulation in effect at the appropriate time. In fact, the regulation then in effect was 48 C.F.R. 901.603-71(b)(1986)). This requirement does not relieve a contracting party of its burden to confirm that the agent with whom it is dealing is authorized to bind the government. Moreover, petitioners ignore the fact that, here, the trial court did not find that the contracting officer, Keefe, ever became aware that petitioners continued performing after February 24 in reliance upon any unauthorized DOE promise.

Indeed, when considered in its entirety, the cited regulation reemphasizes the principle that contracts entered into by unauthor-

Here, as the court of appeals stated, "[i]t appears evident that, if [petitioners] had examined [Keefe's] delegation of authority, [they] could not have reasonably believed [they] had entered into a binding contract with the government in the absence of the required written approval by [Keefe]." Pet. App. 70.

The court of appeals' holding accords with nearly 100 years of precedent in this Court, as well as that of the court of appeals and its predecessor, the United States Court of Claims, recognizing that the government is not bound by the acts of agents beyond the scope of their authority.[4]

Because the court of appeals correctly applied the binding precedent of this Court, petitioners' suggestion (Pet. 14-15) that its decision conflicts with the decision in *PacOrd, Inc.* v. *United States*, 139 F.3d 1320 (9th Cir.

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ized personnel are not binding, 48 C.F.R. 901.603-71(a) (1986), and also dictates elaborate requirements that must be met before a non-binding unauthorized agreement may be ratified by DOE. 48 C.F.R. 901.603-71(c) (1986). The record in this case does not contain evidence that those procedures were followed here.

[4] See, *e.g.*, *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 63 (1984); *Federal Crop Ins. Corp.*, 332 U.S. at 384; *United States* v. *California*, 332 U.S. 19, 40 (1947); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Sutton*, 256 U.S. at 579-580; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917); *Trauma Serv. Group* v. *United States*, 104 F.3d 1321, 1327 (Fed. Cir. 1997); *Total Med. Management, Inc.* v. *United States*, 104 F.3d 1314, 1321 (Fed. Cir.), cert. denied, 118 S. Ct. 156 (1997); *Doe* v. *United States*, 100 F.3d 1576, 1584 (Fed. Cir. 1996); *CACI, Inc.* v. *Stone*, 990 F.2d 1233, 1236 (Fed. Cir. 1993); *City of El Centro* v. *United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), cert. denied, 501 U.S. 1230 (1991); *American Gen. Leasing, Inc.* v. *United States*, 587 F.2d 54, 57-58 (Ct. Cl. 1978); *Correlated Dev. Corp.* v. *United States*, 556 F.2d 515, 525 (Ct. Cl. 1977); *Housing Corp. of America* v. *United States*, 468 F.2d 922, 925 (Ct. Cl. 1972); *Western Pa. Horological Inst., Inc.* v. *United States*, 146 Ct. Cl. 540, 546 (1959).

1998), is irrelevant. In fact, however, *PacOrd* does not conflict with the decision in this case.

PacOrd held that a government regulation specifically requiring express procurement contracts to be in writing does not bar the government's entry into an oral, implied-in-fact contract. The *PacOrd* court recognized that an issue separate from the one it decided was whether the government agent purporting to bind the government possessed the requisite authority to enter into the contract, 139 F.3d at 1322-1323, and accordingly the decision in *PacOrd* distinguished cases, such as this one, where the alleged contract would have been outside the agent's delegated authority. *Id.* at 1323.[5] Indeed, the *PacOrd* court specifically noted that in those cases "the government was not contractually bound because the government agent had no contracting authority or exceeded what authority he had." *Ibid.*[6]

Petitioners also ignore the fact that in this case it was not Keefe who was found to have formed a contract. Instead, the trial court found that Keefe ratified through his silence a contract otherwise offered by the oral representations of an unauthorized DOE official, Beckman. Pet. App. 14 n.27, 31, 49-57. The court of appeals correctly held that even if Keefe had been authorized to enter into the oral contract found by the trial court, the trial court did not find that Keefe was actually aware of Beckman's representations, which is a

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[5] Additionally, for the reasons stated in the *PacOrd* dissent, that decision is inconsistent with the precedent of this Court.

[6] Moreover, *PacOrd* stressed that its holding was limited to implied-in-fact contracts. It is thus distinguishable from this case where the purported contract found by the trial court was express. Pet. App. 160.

necessary element of ratification. *United States* v. *Beebe*, 180 U.S. 343, 354 (1901). Pet. App. 70-71. That fact-specific determination does not warrant this Court's review.

2. Petitioners also argue that even if the alleged oral contract was unauthorized, they were entitled to recover the value of services they allegedly provided to the government on a *quantum meruit* basis. Pet. 11-14. Petitioners suggest that the court of appeals' decision therefore conflicts with *Clark* v. *United States*, 95 U.S. 539 (1877), which allowed *quantum meruit* recovery.[7]

The court of appeals' decision does not address any *quantum meruit* claim because petitioners never made a timely alternative claim for *quantum meruit* recovery, nor do they suggest that they did. Before the trial court, other than one cryptic reference made in closing argument, petitioners chose to stand upon the claim for breach of contract damages resulting from the breach of an allegedly authorized contract. Neither petitioners' complaint, pre-trial motions, nor pre-trial statement of facts and law under Appendix G of the Rules of the United States Court of Federal Claims related or referred to a *quantum meruit* claim, even after the government clearly put into issue whether the alleged contract was authorized. Instead, petitioners sought only breach of contract damages measured by the portion of

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[7] Petitioners also claim that the decision of the Federal Circuit conflicts with *Inter-Island Transport Line, Inc.* v. *Government of the Virgin Islands*, 539 F.2d 322, 328-329 (3d Cir. 1976), and *Blake Construction Co.* v. *United States*, 296 F.2d 393, 396 (D.C. Cir. 1961). In those cases, the circuit court allowed *quantum meruit* recovery where plaintiff conferred some value on defendant under a contract made without authority. Our argument regarding the suggested conflict with *Clark* applies to the alleged conflict with these cases as well.

the contract price with Agrifuels that they did not receive, and claim they would have received had the government not breached the alleged contract. Pet. App. 157-159. Accordingly, the government was never put on notice of an alternative *quantum meruit* claim so that it could address what, if any, applicability a *quantum meruit* claim might have to this case, or submit evidence of the value to the government, if any, of services the government might have received from petitioners.[8]

Similarly, on appeal, petitioners did not argue that the trial court's judgment in their favor should be affirmed on the basis of any *quantum meruit* theory, or that if the court of appeals were to reverse that judgment the case should be remanded for additional proceedings based upon a *quantum meruit* claim.[9] In-

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[8] Whether the United States Court of Federal Claims even possesses jurisdiction to award *quantum meruit* recovery for the value of any performance conferred upon the government in association with a completely unauthorized contract is currently a pending issue before the court of appeals en banc. *AT&T* v. *United States*, 124 F.3d 1471, 1479-1480 (1997), withdrawn, 136 F.3d 793 (Fed. Cir. 1998) (order granting suggestion for rehearing en banc). Among other things, the government has contended in that appeal that *quantum meruit* is an implied-in-law recovery, *EWG Assocs.* v. *United States*, 231 Ct. Cl. 1028, 1030 (1982), and that it is outside of the jurisdiction of the Court of Federal Claims to award. *Hercules, Inc.* v. *United States*, 516 U.S. 417, 423 (1996). *Clark* never analyzed the jurisdiction of the lower court over a *quantum meruit* claim.

[9] The only reference petitioners made to a *quantum meruit* theory appeared in their reply brief in support of their cross appeal. Petitioners thus waived in the court of appeals their argument regarding *quantum meruit*. See *Becton Dickison, & Co.* v. *C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990) ("[A]n issue not raised by an appellant in its opening brief * * * is waived.").

stead, petitioners chose to defend the judgment solely on the breach of contract theory.

Accordingly, petitioners failed to assert a claim for *quantum meruit* recovery before both the trial court and the court of appeals. This Court does not ordinarily consider issues that were neither raised before nor considered by the lower courts. See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Petitioners' failure to advance a *quantum meruit* claim below is not merely academic. The value to the government of any services the government may have received from petitioners' performance subsequent to Beckman's representation would present a question clearly distinct from the breach of contract damages actually sought by petitioners before the trial court. Those damages were derived from petitioners' contract price with Agrifuels for the construction work performed by petitioners after Beckman's representation, and petitioners' costs incurred in starting up the plant. Pet. App. 157-159.

Clearly, petitioners' contract price with Agrifuels, and their plant startup costs, do not dictate the value of their actions to the government, which only obtained value from the plant as collateral for its guarantees. As previously noted, after assuming control of the plant the government paid approximately $70 million in guarantees. However, the government only received approximately $3 million from its sale of the plant to offset its expenditure. Pet. App. 43. Any value to the government of petitioners' construction work between February 24 and April 7, 1987, is, at most, a fraction of that $3 million received in its sale. Additionally, petitioners' startup costs in serving Agrifuels did not necessarily

contribute anything in value to the $3 million the government received from its sale of the plant as scrap.

As noted, petitioners' failure timely to assert a *quantum meruit* claim denied the government any opportunity at trial to present evidence of the amount of value it actually may have received. Having failed upon the sole claim for breach of contract damages that they advanced below, petitioners should not be permitted to pursue an entirely new claim, requiring the presentation of different evidence than the claim that was tried, for the first time before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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